



BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION  
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IN THE MATTER OF QWEST CORPORATION'S  
PETITION FOR ARBITRATION AND APPROVAL  
OF AMENDMENT TO INTERCONNECTION  
AGREEMENT WITH ARIZONA DIALTONE, INC.  
PURSUANT TO SECTION 252(b) OF THE  
COMMUNICATIONS ACT OF 1934 AS  
AMENDED BY THE TELECOMMUNICATIONS  
ACT OF 1996 AND APPLICABLE STATUTES.

DOCKET NO. T-01051B-07-0693  
T-03608A-07-0693

COMMISSION STAFF'S BRIEF

I. INTRODUCTION.

On December 17, 2007, Qwest Corporation ("Qwest") filed a Petition with the Arizona Corporation Commission ("Commission") pursuant to 47 U.S.C. Section 252(b) for Arbitration of disputed issues arising from its negotiations with Arizona Dialtone, Inc. ("AZDT") relating to implementation of the Federal Communications Commission's ("FCC") most recent Triennial Review Order ("TRO")<sup>1</sup> and Triennial Review Remand Order ("TRRO").<sup>2</sup> In its Petition, Qwest set forth five disputed issues for resolution by the Commission.

AZDT filed a response to Qwest's Petition on January 17, 2008. AZDT states that "...AZDT has been willing to sign a TRRO Amendment so long as that amendment addresses not only the impact of the TRO and TRRO on the ICA, but also, AZDT's ongoing billing disputes with Qwest which AZDT has sought to resolve for several years without success."<sup>3</sup>

Arizona Corporation Commission

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<sup>1</sup> Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17145, para. 278 (2003) (Triennial Review Order), corrected by Errata, 18 FCC Rcd 19020 (2003) ("Triennial Order Errata"), vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II") cert. denied, 125 S.Ct. 313, 316, 345 (2004).

<sup>2</sup> Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al., CC Docket Nos. 01-338 et al, Order on Remand, (released February 4, 2005) ("Triennial Review Remand Order").

<sup>3</sup> AZDT January 15, 2008 Response to Qwest's Petition for Arbitration at para. 5.

1 Qwest also filed a Complaint against AZDT on December 17, 2007. In the Complaint, Qwest  
2 seeks Commission rulings regarding the parties' obligations under their existing interconnection  
3 agreement ("ICA") and existing law. In its response to Qwest's Complaint, AZDT once again states  
4 that "...AZDT has been willing to sign a TRRO Amendment so long as that amendment addresses  
5 not only the impact of the TRO and TRRO on the Interconnection Agreement ("ICA") between  
6 Qwest and AZDT, but also, AZDT's ongoing billing disputes with Qwest which AZDT has sought to  
7 resolve for several years without success.<sup>4</sup>

8 A joint procedural conference for both the Arbitration matter and the Complaint matter<sup>5</sup> was  
9 held on January 14, 2008. Neither Qwest nor AZDT objected to consolidating the two proceedings;  
10 and the issue of consolidation was taken under advisement. Qwest, AZDT and Staff were ordered to  
11 file a brief by January 28, 2008, discussing: (1) Qwest's authority to petition for arbitration under 47  
12 U.S.C. Section 252, and, (2) the applicability of the 47 U.S.C. Section 252 timelines.

13 Following is Staff's brief on the two issues set forth in the Commission's January 16, 2008  
14 Procedural Order.

## 15 II. DISCUSSION.

### 16 A. The TRO Allows Qwest to Utilize the Arbitration Process Contained in 47 U.S.C. 17 Section 252 if Its Negotiations to Implement the New Unbundling Rules are 18 Unsuccessful.

19 First, the law on the issue of an Incumbent Local Exchange Carrier's ("ILECs") ability to  
20 request arbitration under 47 U.S.C. Section 252 appears to be quite well-settled.

21 The FCC has spoken directly to this issue in the following passage from its TRO:

22 Section 252(a)(1) states that "upon receiving a request for  
23 interconnection, services, or network elements pursuant to section 251,  
24 an incumbent local exchange carrier may negotiate and enter into a  
25 binding agreement with the requesting telecommunications carrier or  
26 carriers." If the parties cannot reach agreement, the party requesting  
27 interconnection, services, or network elements may petition the  
relevant state commission to arbitrate the dispute. See 47 U.S.C.  
Section 252(b)(1). Such petitions must be submitted between the 235<sup>th</sup>  
to the 160<sup>th</sup> day (inclusive) after the date on which an incumbent LEC  
received the request for interconnection, services, or network elements.  
Id. The state Commission must resolve the dispute no later than nine

28 <sup>4</sup> AZDT January 22, 2008 Answer to Qwest Corporation's Complaint at para 10.

<sup>5</sup> Qwest's Complaint was assigned the Docket No. T-01051B-07-0694 and T-03608A-07-0694.

1 months after the date on which the incumbent LEC received the request  
2 for interconnection, services, or network elements. See 47 U.S.C.  
3 Section 252(b)(4)(C). Although section 252(a)(1) and section  
4 252(b)(1) refer to requests that are made to incumbent LECs we find  
that in the interconnection amendment context, either the incumbent or  
the competitive LEC may make such a request, consistent with the  
parties' duty to negotiate in good faith pursuant to section 251(c)(1).<sup>6</sup>

5 In addition several courts have spoken to this issue finding that either the ILEC or  
6 Competitive Local Exchange Carrier ("CLEC") may request arbitration under 47 U.S.C.  
7 Section 252.<sup>7</sup>

8 Moreover, as Qwest points out, other provisions of the *TRO* specifically provided that absent  
9 a change of law and/or transition timing, the ILEC and CLEC were to use section 252(b) as a default  
10 timetable for modification of their interconnection agreement. In this case, there is a change of law  
11 provision in the parties' ICA. Qwest routinely includes change of law provisions in all of its ICAs.  
12 However, AZDT refused to sign the Amendment, apparently because of ongoing litigation in another  
13 Commission proceeding and its desire to resolve other outstanding issues with Qwest unrelated to the  
14 *TRRO*. In such an event, the *TRO* also goes on to state that "... [f]urther, under the section 252(b)  
15 timetable, where a negotiated agreement cannot be reached, parties would submit their requests for  
16 state arbitration as soon as 135 days after the effective date of this Order but no longer than 160 days  
17 after this Order becomes effective."<sup>8</sup> While the *TRO*'s unbundling provisions were overturned in  
18 large part by the D.C. Circuit Court in *USTA II*<sup>9</sup> on March 2, 2004, the provisions regarding use of  
19 47 U.S.C. 252(b) as a default timetable were not overturned.

20 The next question is whether Qwest met the technical requirements of the 1996 Act with  
21 respect to its Petition for Arbitration. Technically, it could be argued that Qwest did not file its  
22 Petition within the window provided, if one uses the Effective date of the *TRRO* as a starting point,

23  
24 <sup>6</sup> *TRO* at n. 2087.

25 <sup>7</sup> See, *inter alia*, *US West Communications v. Sprint Communications Company*, 275 F.3d 1241 (10th Cir. 2002) ("But if  
26 private negotiation fails, either party can petition the state commission that regulates local phone service to arbitrate open  
issues, which arbitration is subject to Section 251 and the FCC regulations promulgated thereunder."); *Illinois Bell*  
27 *Telephone Company v. Illinois Commerce Commission et al.*, 2007 WL 2815924 (N.D. Illinois 2007) ("In the event that  
negotiations are not successful, either the ILEC or CLEC may petition the appropriate state public utility commission –  
in this case, the ICC – to arbitrate "any open issues" that the parties have not been able to resolve through negotiation.").

28 <sup>8</sup> *TRO* at para. 703.

<sup>9</sup> *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied*, 125 S.Ct. 313, 316,  
345 (2004).

1 which was what was originally contemplated by the FCC in the *TRO*.<sup>10</sup> The *TRRO* was effective on  
2 March 11, 2005.<sup>11</sup> Qwest did not file its Petition for Arbitration until December 17, 2007. Qwest  
3 apparently waited until the District Court entered an order in Section 271 litigation<sup>12</sup> which AZDT  
4 was relying upon, in part, not to sign Qwest's Amendment. However, setting aside this issue, as a  
5 general matter, the Staff agrees with Qwest that it had a right to utilize the arbitration process if its  
6 negotiations to implement the *TRRO* were unsuccessful.

7 Two other points merit discussion and consideration after a review of AZDT's response to  
8 Qwest's Petition for Arbitration. First, AZDT does not appear to have any specific objection to  
9 Qwest's *TRRO* Amendment. Rather, AZDT appears to want to use the *TRRO* Amendment as  
10 leverage to get other changes made to its ICA, or to obtain rulings on how its existing ICA with  
11 Qwest should be interpreted. But, Staff does not believe that the FCC contemplated in the *TRO* or  
12 *TRRO* that its suggested use of the Section 252 timetable as a "default timetable" for modification of  
13 interconnection agreements to recognize the FCC's new unbundling requirements, would be used to  
14 bring in a lot of additional extraneous issues for resolution by the State Commission. This simply  
15 would not make sense given the FCC's admonition that "[w]e find that delay in the implementation  
16 of the new rules we adopt in this Order will have an adverse impact on investment and sustainable  
17 competition in the telecommunications industry."<sup>13</sup> Second, it appears the "billing dispute" issues  
18 raised by AZDT would more appropriately be resolved through a complaint proceeding, should  
19 AZDT choose to file a complaint with the Commission. Overall however, AZDT has not given  
20 sufficient information regarding the nature of its disputed issues for resolution of the issues in any  
21 type of proceeding.

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26 <sup>10</sup> As discussed above, the FCC directed the parties to use the *TRO*'s effective date as the start of negotiations for  
purposes of using the 252 process to implement the new federal unbundling requirements.

27 <sup>11</sup> See *TRRO* at para. 235.

28 <sup>12</sup> *Qwest Corporation v. ACC et al.*, Arizona District Court No. CV 06-1030-PHX-ROS, Order entered July 27, 2007.  
See also letter from Andrew J. Creighton to William Cleaveland dated July 20, 2007, Appendix A to Qwest's Petition for  
Arbitration.

<sup>13</sup> *TRO* at para. 703.


1 In the end, Staff seriously questions whether an arbitration proceeding is the appropriate  
2 vehicle to resolve the issues between the parties, since AZDT raised no objections regarding to the  
3 substance of Qwest's *TRRO* Amendment, on a prospective basis.

4  
5 **B. As Styled, an Arbitration Proceeding under 47 U.S.C. Section 252, the Section**  
6 **252 Timelines would Apply.**

7 If the proceeding is styled as an arbitration under 47 U.S.C. Section 252, Staff believes that  
8 the Section 252 timelines would apply, at least with respect to the issues raised in the Arbitration.  
9 However, unless Staff has misinterpreted AZDT's responses to Qwest's Arbitration Petition and its  
10 Complaint, Staff believes that most of the issues apparently in dispute between the parties have to do  
11 with interpretations of the parties' existing ICA, and thus are more appropriately resolved in a  
12 complaint proceeding. Even the *TRRO*'s implementation arguably should have been accomplished  
13 by the Change of Law provision in the parties' existing ICA. Again, AZDT does not appear to have  
14 any real issue with Qwest's *TRRO* Amendment. AZDT simply seeks to use the *TRRO* Amendment to  
15 resolve other "billing disputes" as well. However, if AZDT has "billing issues" with Qwest  
16 regarding its existing ICA, the appropriate remedy for AZDT is to file a complaint with the  
17 Commission.

18 Finally, Staff does not support consolidation of the Complaint proceeding with the Arbitration  
19 proceeding. Arbitration proceedings address issues on a prospective basis. Complaint proceedings  
20 typically address issues pertaining to disputes regarding the parties' existing ICA. With a Complaint  
21 proceeding, one is looking backwards in time, not prospectively. Staff believes that mixing  
22 complaint and arbitration proceedings will ultimately lead to confusion.

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...  
RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of January, 2008.

  
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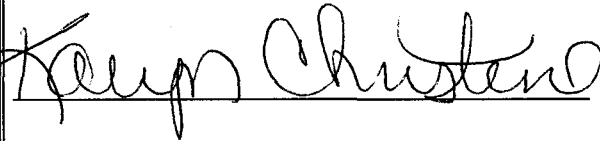
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